The sales of Insta-Mix's products in Louisiana were not an isolated occurrence; they directly arose from Insta-Mix's efforts to serve the market for its products in other States, including the market in Louisiana. Insta-Mix filled dozens of orders expressly earmarked for Louisiana delivery, and many others for sale of its products throughout the country. For all of the Louisiana orders, Insta-Mix was electronically notified of the Louisiana destination in advance, and voluntarily chose to fill those orders for Wal-Mart. Having had the accused products sold in Louisiana for nearly two years, Insta-Mix served and benefitted from the market there. As a result, the Fifth Circuit correctly found that a finding of personal jurisdiction over Insta-Mix in Louisiana was within *World-Wide Volkswagen's* constitutional principles.

In light of the splintered views in *Asahi*, most other circuit courts have likewise expressly or impliedly continued to follow *World-Wide Volkswagen* in one form or another. *See* Kristin R. Baker, *Comment, Product Liability Suits and the Stream of Commerce after Asahi: World-Wide Volkswagen Is Still the Answer*, 35 Tulsa L.J. 705, 706 (2000). As a result, the split between the circuits after *Asahi* is more nominal than real.[7]

That the Fifth Circuit's decision is well supported by prior precedent is further demonstrated by this Court's majority opinion in *Burger King*. As *Burger King* reaffirmed, "the foreseeability that is critical to the due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there". *Burger King Corp. v.*

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7. In fact, after *Asahi* it is often unclear which plurality a given court is actually following, if indeed it is even following any.

Rudzewicz, 471 U.S. 462, 474, 105 S. Ct. 2174, 2183 (1985), *quoting*, *World-Wide Volkswagen*, 444 U.S. at 297, 100 S. Ct. at 567. To fulfill due process, there must be some act by which the defendant purposefully avails itself of the privilege of conducting business within the forum State, subjecting itself to its jurisdiction.[8] *Burger King*, 471 U.S. at 475, 105 S. Ct. 2174 at 2183. Here, having filled orders for Wal-Mart's Louisiana distribution center, Insta-Mix purposefully availed itself of the privilege of having its products sold within Louisiana, and should reasonably have anticipated being haled into a Louisiana court.

The purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts with that jurisdiction. *Burger King*, 471 U.S. at 474-475, 105 S. Ct. at 2183. But the accused goods in this case did not randomly end up in Louisiana. There was nothing unpredictable about it. Even Insta-Mix's President admitted at his deposition that it was foreseeable that Insta-Mix' products would go to Louisiana, and that it was not random or fortuitous.

The electronic notice to Insta-Mix of the desired destination and the subsequent shipments there are, consequently, more than sufficient under *Volkswagen* and *Burger King* to pass constitutional muster. For each of the requested orders, the goods were placed onto trucks for

8. Prior precedent confirms that a single purposeful contact can confer jurisdiction. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222, 78 S. Ct. 199 (1957). The regular and repeated activity over the course of sixty seven shipments by Insta-Mix was well beyond a sufficient single purposeful contact.

intended delivery to Louisiana, which is where they were, in fact, delivered.[9] It should not be necessary for Insta-Mix to physically visit the forum or to engage in "plus" for jurisdiction to attach. Nowadays, "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted". *Burger King*, 471 U.S. 462, 476, 105 S. Ct. 2174, 2184 (1985). "Jurisdiction may not be avoided merely because the defendant did not physically enter the forum state." *Id.* Thus, Insta-Mix's activity was properly held to fulfill the requirement for minimum contacts.

Likewise, exercise of jurisdiction was entirely within traditional notions of fair play and substantial justice. To the contrary, it would have been unjust for Insta-Mix to benefit from the Louisiana market, and then hold that the injured Louisiana resident could not sue there. The Due Process Clause is intended to work fairness: it "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit". *World Wide Volkswagen*, 444 U.S. at 297, 100 S. Ct. at 567. Insta-Mix had every opportunity to structure its conduct. Luv n' care did not force it to fill Louisiana bound orders – it was Insta-Mix's choice to do so.

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9. *See, e.g., Ruston Gas Turbines, Inc. v. Donaldson Company, Inc.*, 9 F.3d 415, 420 (5th Cir. 1993) ("Corchran intentionally placed its products in the stream of commerce by delivering them to a shipper destined for delivery in Texas. At the time the goods left Corchran's plant in Minnesota, Corchran not only could have foreseen that the products might end up in Texas, it knew as a fact that the products were going to be delivered to a specific user in Houston, Texas.").

II. The Stream of Commerce Test Applied by the Fifth Circuit Was Entirely Sound and Need Not be Disturbed

Admittedly, the Fifth Circuit's practice is consistent with the stream of commerce test articulated in Justice Brennan's plurality, and rejects Justice O'Connor's stream of commerce plus test. App. 6-7. The Fifth Circuit has a long history of following this approach – it had done so before *Asahi* was decided, and continued to do so after the failure in *Asahi* in 1987 to achieve a majority.[10]

But, contrary to petitioner's position, the Fifth Circuit's approach is constitutionally sound. Its consistent holdings have been rooted in its effort to faithfully interpret *World-Wide Volkswagen*. App. 6. Under its interpretation (and that of Justice Brennan's plurality), it comports with due process to exercise jurisdiction over an entity that delivers products into the stream of commerce with the expectation they will be purchased by consumers in the forum State. *Id.* The present case demonstrated the logic of that position.

Petitioners complain that this approach requires any manufacturer to submit to jurisdiction in any forum anywhere. App. 11. That is incorrect. The test requires

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10. *See Oswalt v. Scripto, Inc.*, 616 F.2d 191, 199-200 (5th Cir. 1980); *Bean Dredging Corp. v. Dredge Tech. Corp.*, 744 F.2d 1081 (5th Cir. 1984); *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 385-386 (5th Cir. 1989) (explaining that the Fifth Circuit continues to applied the stream of commerce standard described in *World-Wide Volkswagen* because the Court's splintered view of minimum contacts in *Asahi* provides no clear guidance on the issue); *Ruston Gas Turbines v. Donaldson Co.*, 9 F.3d 415, 419-420 (5th Cir. 1993). *See also, Asahi*, 480 U.S. at 111, 117 n.1 (citing *Bean Dredging*).

jurisdiction only in those product destinations that meet reasonable expectations. As Justice Brennan stated:

> [t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise."

Asahi, 480 U.S. at 117, 107 S. Ct. at 1034 (Brennan, J., plurality opinion).

In contrast, the stringent stream of commerce plus type approach being urged by petitioners is a thoroughly imprudent one. Its requirement for additional activity in the forum necessitates that an almost personal relationship be shown between a party and the particular forum state. In so doing, it ignores the realities of the marketplace and unduly limits the rights of consumers and others to pursue redress where injuries occur. When a defendant causes injury in another state from the foreseeable flow of its products there, it is entirely just for it to be called to account in that state. But stream of commerce plus restricts one from doing so.

As commentators have recognized, such restriction of jurisdiction in the modern era is unwise. "[G]iven the increasing ease with which products move in international commerce, narrowing the reach of U.S. courts is a step in the 'wrong direction.'". Connie M. Ericson, *Casenote: CMMC v. Salinas: The Texas Long-Arm Statute Does Not Reach French Equipment Manufacturer (But Maybe it*

Should), 20 Hous. J. Int'l L. 493, 511-512 (1998). The more likely it is that consumers and workers will be affected by products distributed throughout the United States by third parties, the less fair it is to those consumers and workers to limit their ability to hold the manufacturer accountable for its products when they cause injury. *Id.*

In his special concurrence here, Fifth Circuit Judge DeMoss indicated that he would have followed the Fourth Circuit's view in *Lesnick* had he not been constrained by his circuit's precedent. App. 16; *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939 (1994). In *Lesnick*, the Fourth Circuit began by reading *World-Wide Volkswagen* and *Asahi* as teaching that the touchstone of the minimum contacts analysis is a determination of whether the out-of-state person had engaged in some activity purposefully directed toward the forum state. *Lesnick*, 35 F.3d at 945. That purposeful activity is present here.

However, *Lesnick* proceeded to then further require additional conduct as per Justice O'Connor's *Asahi* plurality. *Lesnick*, 35 F.3d at 945-946. Accordingly, Judge DeMoss stated that under this case's facts, jurisdiction would not have attached in a stream of commerce plus court, such as the Fourth Circuit.

Yet, if that is true, it only demonstrates the flaws in the stream of commerce plus test, not the flaws in stream of commerce. Petitioner engaged for nearly two years in regular, ongoing, sales of products intended for delivery to Louisiana. To the extent that a stream of commerce plus approach would be powerless to afford jurisdiction in Louisiana, it is extremely ill-advised. When a corporation places a product into the stream of commerce with knowledge of where that

product is going, that company should be held accountable when the product causes injury there. *See, e.g.*, Lori Elizabeth Jones, *Note, Lesnick v. Hollingsworth & Vose Co. – The Pure Stream of Commerce No Longer Flows Through the Fourth Circuit*, 29 U. Rich. L. Rev. 421 (1995) (criticizing the Fourth Circuit's adoption of stream of commerce plus and urging adoption of Justice Brennan's stream of commerce approach).

Moreover, to require something beyond stream of commerce requirements is inconsistent with this Court's precedent. *See, e.g., Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946 (7th Cir. 1992) ("Because the Supreme Court established the stream of commerce theory, and a majority of the court has not yet rejected it, we consider that theory to be determinative. We may not depart from Court precedent on the basis of a belief that present Supreme Court Justices would not readily agree with past Court decisions", *citing, Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 109 S. Ct. 1917, 1921-1922 (1989)). To the extent that the stream of commerce plus test would have required more, it is not constitutionally necessary.

Thus, the Eighth Circuit, for example, has been said to have retreated from earlier approval of stream of commerce plus, and since moved to a stream of commerce approach instead. *See Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610 (8th Cir. 1994); *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943 (8th Cir. 1998).[11] That shift has been recognized as promoting equity.

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11. Petitioner states that the subsequent cases of *Dever* and *Stanton* appear to use a stream of commerce plus approach. In *Dever*, however, the court indicated that the mere fact that Barr's products

(Cont'd)

Richard M. Elias, *Note, In Search of a Broader Stream of Commerce Theory: The Eighth Circuit Streams Past Inconsistencies in Favor of Equitable Results*, 67 Mo. L. Rev. 99 (2002); Timothy C. Lynch, *Personal Jurisdiction: Roman Candles and Bottle Rockets: The Eighth Circuit Blows up the "Stream of Commerce Plus" Analysis in Barone v. Rich Bros. Interstate Display Fireworks, Inc.*, 29 Creighton L. Rev. 1371 (1996). It also represents an ongoing evolution in the case law which may signify an eventual evaporation in the future of any nominal differences between the circuits, as the courts continue to develop responses to modern conditions.

Similarly, the growth of the Internet favors stream of commerce jurisdiction, *not* stream of commerce plus. *See, e.g.*, Christopher M. Porterfield, *Note and Comment*,

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(Cont'd)

were found in Arkansas was insufficient to support jurisdiction, and pointed out that nothing suggested that Barr had the expectation that the products would penetrate the forum market. *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1075 (8th Cir. 2004). The latter language cites *Vandelune* and *Barone* with approval, and mirrors Justice Brennan's remarks in *Asahi* regarding a defendant's expectation. *Stanton*, on the other hand, is confusing, and fails to clearly elucidate which approach it is following. *Stanton v. St. Jude Medical, Inc.*, 340 F.3d 690, 694 (8th Cir. 2003). It cites both *World-Wide Volkswagen* and the Eighth Circuit's previous stream of commerce case in *Clune* (that jurisdiction may be found where a seller uses a distribution network to deliver products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state) suggesting that it follows the stream of commerce approach. But it also cites *Asahi* for the proposition that knowledge did not constitute minimum contacts. Ultimately, it appears to have found jurisdiction lacking based on its opinion that any contacts with the forum were the result of the actions of a third party.

Which Stream to Follow: Why the Eleventh Circuit Should Adopt a Broader Stream of Commerce Theory in Light of Growing E-Commerce Markets, 20 Ga. St. U. L. Rev. 539, 562-564 (2003) (concluding that the growth of electronic commerce requires broader not narrower application of stream of commerce theory).

In the age of cyberspace, stream of commerce jurisdiction protects local plaintiffs who have claims against out-of-state and foreign companies based on Internet contacts. *Id.* The nature of those contacts are such that they do not necessarily meet any of the *Asahi* "plus" factors. Yet, a state still has a strong interest in providing redress for its injured residents based on them.

In those instances, residents often find it impractical to sue in the defendant's jurisdiction. *Id.* Resident plaintiffs also have a strong interest in avoiding the expense, inconvenience, and potential bias of a foreign defendant's jurisdiction, which generally offer plaintiffs fewer chances of recovery. *Id.* Stream of commerce provides jurisdiction while also providing fairness, since prior Supreme Court decisions already ensure that defendants will not be haled into a jurisdiction solely as a result of contacts which are 'random,' 'fortuitous,' or 'attenuated'. *Id.*

III. The Stream of Commerce Test Does Not Contravene Federalism

Circuit Judge DeMoss and those courts such as the Fourth Circuit that have raised constitutional objections to stream of commerce jurisdiction are both mistaken. Both historically, and as applied here, the stream of commerce approach does not violate principles of federalism.

To date, this Court's personal jurisdiction jurisprudence has explicated Fourteenth Amendment due process requirements since prior questions have arisen in the context of state and diversity cases. *Akro*, 45 F.3d at 1544-1545; *Honeywell*, 509 F.2d at 1143; *World-Wide Volkswagen*, 444 U.S. at 291, 100 S. Ct. at 564 (Fourteenth Amendment Due Process Clause limits the power of a state court); *Burger King*, 471 U.S. at 464, 105 S. Ct. at 2177-2178 (Fourteenth Amendment Due Process Clause as applied to diversity action)[12]; *Asahi*, 480 U.S. at 108, 107 S. Ct. at 1030 (Fourteenth Amendment Due Process Clause limits the power of a state court). However, the present action arises under a federal question. As a result, the relevant provision is the Due Process Clause of the Fifth Amendment. *Honeywell*, 509 F.2d at 1143; *Akro*, 45 F.3d at 1544-1545; *Dakota*, 946 F.2d at 1389 n.2.

In the absence of Fifth Amendment due process decisions by this Court[13], the various circuits have guided themselves by Fourteenth Amendment precedent when confronted with personal jurisdiction challenges in suits over federal

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12. In *Burger King*, any constitutional issues relating to the federal question of trademark infringement were not reached by the Court. *Burger King*, 471 U.S. at 470 n.11, 105 S. Ct. at 2181 n.11.

13. In *Omni Capital*, for example, this Court recognized that the constitutional scope of personal jurisdiction in a federal question case arises under the Fifth Amendment. However, it did not need to reach the due process issue, in view of its decision regarding service of process. *Omni Capital, Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987).

questions.[14] In that context, the circuits have adopted the minimum contacts standard elaborated in *International Shoe* and its progeny, and have applied it in federal question cases as well. *Honeywell*, 509 F.2d at 1143 (collecting cases); *Akro*, 45 F.3d at 1545; *Dakota Industries* 946 F.2d at 1389 n.2. In that vein, the Fifth Circuit likewise referred to Fourteenth Amendment principles here. App. 4.

Yet, under either the Fifth Amendment or the Fourteenth Amendment, stream of commerce jurisdiction does not

14. As the *Honeywell* court put it,

> [w]e recognize, of course, that *International Shoe* and its direct progeny reached the federal judiciary either by way of review of state court judgments or by way of diversity jurisdiction, and as a result, the holdings in those cases have been framed in terms of restraints on state power. In this litigation, on the other hand, a federally created right is at issue, and due process is properly a matter for examination in light of the Fifth Amendment rather than the Fourteenth Amendment. That is not to say, however, that the *International Shoe* line of cases is irrelevant to our inquiry here. The due process clause of the Fifth Amendment is essentially a recognition of the principles of justice and fundamental fairness in a given set of circumstances, *Galvan v. Press*, 347 U.S. 522, 530, 98 L. Ed. 911, 74 S. Ct. 737 (1954); *Aetna Insurance Company v. Hartshorn*, 477 F.2d 97, 100 (5th Cir. 1973), and, so viewed, on the facts of this case, we can perceive no operative difference between the concept of due process as applied to the states and as applied to the federal government. This and other courts have reached this result, explicitly or tacitly, and have applied the "minimum contacts" standard to federal question cases in which in personam jurisdiction was at issue, and we deem it appropriate to do so here.

Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d at 1143 (collecting cases).

implicate federalism difficulties. The due process requirements of the Fifth Amendment represent a restriction on judicial power "not as a matter of sovereignty, but as a matter of individual liberty." *Omni Capital*, 484 U.S. at 104. Likewise, while due process under the Fourteenth Amendment operates to restrict state power, it is "ultimately a function of the individual liberty interest preserved by the Due Process Clause rather than as a function of federalism concerns". *Burger King*, 471 U.S. 462, 471-472 n.13, 105 S. Ct. 2174, 2181-2182 n.13, *citing*, *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-703 n.10, 102 S. Ct. 2099, 2104-2105 n.10 (1982) (internal quotes omitted).

Furthermore, even with respect to issues of sovereignty, each state has an interest in protecting the rights of its citizens. *Burger King*, 471 U.S. at 473, 105 S. Ct. at 2182 (internal quotes omitted). With respect to the out-of-state actor, the state's jurisdiction is also justified since "[a] defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum state, and indirectly benefits from the State's laws that regulate and facilitate commercial activity." *Asahi*, 480 U.S. at 117, 107 S. Ct. at 1035 (Brennan, J., plurality opinion).

The question is, therefore, not one of sovereignty, but of choice between forums. The Fifth Circuit's choice provides that the tortfeasor, whose goods went to Louisiana, can be sued in Louisiana. This is a reasonable result: an out-of-state actor should not be permitted to send a defective or infringing products to another state, immune from jurisdiction where his acts cause damage. A state should no more have to tolerate that than be required to stand idly by while an out-of-state actor lobs live grenades across state lines.

The stream of commerce plus choice made by contrary circuits would burden the damaged resident – who remained at all times in its Louisiana home – and force it to leave its forum to sue in the tortfeasor's home territory. That choice places an undue and unjustified onus on corporations and consumers. It adds insult to injury, allowing the tortfeasor to place yet a further imposition on them.

Petitioners' approach would, thus, attempt to use federalism principles (which are not in fact violated) to protect defendants from being called to account where their products cause injury. But the Due Process Clause is not a territorial shield to enable defendants to avoid interstate obligations that have been voluntarily assumed. *Burger King*, 471 U.S. at 474, 105 S. Ct. at 2183. Here, the out-of-state petitioners' goods were sought for a Louisiana market and sent to that market; it was, therefore, within the authority of the Louisiana courts to exercise jurisdiction over their resident's cause of action. A state has a manifest interest in providing residents with a forum for redressing injuries inflicted by out-of-state actors. *Burger King*, 471 U.S. at 473, 105 S. Ct. at 2182.

CONCLUSION

As set forth above, Insta-Mix's petition for a writ of certiorari should be denied.

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Supreme Court, U.S.
FILED
JUN 6 - 2006
OFFICE OF THE CLERK

No. 05-1232

IN THE

Supreme Court of the United States

INSTA-MIX, INC., UMIX, INC., UMIXPRODUCTS, INC., UMIX SPORTS, INC., UMIXPRO, AND UMIXBABY

Petitioners

v.

LUV N' CARE, LTD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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INTRODUCTION AND SUMMARY OF ARGUMENT

In its opposition, Respondent concedes that a split exists between the circuits and states that use the "stream of commerce" test first mentioned in *dicta* in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) and the circuits and states that use the "stream of commerce plus" test stated in Justice O'Connor's plurality opinion in *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987). Also, Respondent did not even attempt to rebut Petitioner's argument that this case presents an ideal set of facts to use in resolving the question presented. Thus, the Court should grant the petition for *certiorari*.

Further, Respondent's argument that the correct standard is the "stream of commerce" test does not weigh against granting the petition. First, Respondent's arguments are substantively wrong. Second, even if Respondent is correct, the Court should still grant the petition because, under Respondent's theory, the states and circuits that use "stream of commerce plus" are not properly exercising personal jurisdiction. Thus, the Court should grant the petition to ensure a single nation-wide standard for personal jurisdiction.

Finally, Respondent's argument that Judge DeMoss and other judges are incorrect in finding federalism problems with the "stream of commerce" test is wrong. Respondent's argument is based on a one-sided weighing of the rights of a plaintiff, while completely ignoring the rights of a defendant.[1] Thus the Court should also grant the petition to resolve the federalism issues.

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[1] Respondent's argument that this case should be analyzed under the Due Process clause of the Fifth Amendment is misleading and irrelevant. *See* Section IV *infra*.

ARGUMENT

I. Petitioner's Argument that There is a Split in State and Federal Courts Regarding the Proper Test for Personal Jurisdiction Stands Unrebutted

Respondent acknowledges the circuit split regarding this important jurisdictional issue. Nevertheless, Respondent argues that most circuit courts have expressly or implicitly followed the stream of commerce test due to the "splintered" views in *Asahi*. Opp. Br. at 5 (*citing* Kristin R. Baker, Comment: *Product Liability Suits and the Stream of Commerce After Asahi: World-Wide Volkswagen Is Still the Answer*, 35 Tulsa L.J. 705, 706 (2000)). But Respondent's argument does not stand scrutiny for at least two reasons. First, the only authority to which Respondent cites in support of its argument is a student comment that is patently inaccurate. The student comment cites to *Ruston Gas Turbines, Inc. v. Donaldson, Co.*, 9 F.3d 415, 420 (5th Cir. 1993) and *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992) as support for its statement that the Fifth Circuit and the Seventh Circuit both use the "stream of commerce plus" test. Baker, 35 Tulsa L.J. 706 at n.12. But both cases actually stand for the exact opposite: that the respective circuits both use the "stream of commerce" test.[2] Second, numerous courts recognize the split in the circuits. *See, e.g., Bridgeport Music, Inc. v. Still N the Water Publ'g*, 327 F.3d 472, 479-80 (6th Cir. 2003) (recognizing the circuit split and deciding that the Sixth Circuit will use "stream of commerce plus"); *see also Commissariat a l'Energie Atomique v. Chi Mei Optoelectronics Corp.*, 395 F.3d 1315, 1321-23 (Fed. Cir. 2005) (recognizing the circuit split).

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[2] The student comment does, however, accurately point out that the First Circuit uses the "stream of commerce plus" test. *Id.* (*citing Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 683 (1st Cir. 1992)).

Thus, Respondent's subsequent conclusion that the circuit split is "more nominal than real," Opp. Br. at 5, is flatly wrong.[3]

Similarly, Respondent's contention that the confusion within the Eighth Circuit over which standard it should use "may signify an eventual evaporation in the future on any nominal differences between the circuits," *id.* at 12, is also wrong. As Insta-Mix demonstrated in its petition,[4] the split is large and growing, with at least four circuits and fifteen states using the "stream of commerce plus" test and at least three circuits and six states using the "stream of commerce" test. *See* Pet. Br. at 6-8. Indeed, subsequent to the filing of this petition, a district court in the District of Columbia weighed in on this issue (the D.C. Circuit has not ruled on which standard to use). *Kopff v. Battaglia*, 2006 U.S. Dist. LEXIS 13638 at *16-17 (D.D.C. Mar. 29, 2006) (quoting Justice O'Conner's "stream of commerce plus" test in deciding that it lacked jurisdiction over a defendant). The Court should resolve this growing circuit split.

Moreover, even if Respondent's speculation is correct that this circuit split may somehow magically "evaporate" at some unknown future time, the Court should still grant *certiorari*. Respondent admits that "after *Asahi* it is often unclear which [*Asahi*] plurality a given court is

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[3] Indeed, the falsity of this statement is shown by Respondent's brief. Respondent admits that in many cases the existence of jurisdiction based on Internet contacts would depend on whether a court used "stream of commerce" or "stream of commerce plus." *See* Opp. Br. at 13.

[4] Petitioner Insta-Mix, Inc. ("Insta-Mix") does business or has done business in the other names in the style of the Petition (Umix, Inc., Umixproducts, Inc., Umix Sports, Inc., Umixpro, and Umixbaby).

actually following, if ***indeed it is even following any.***" Opp. Br. at 5 n.7 (emphasis added). Respondent's statement demonstrates the correctness of Judge DeMoss' statement that the test for personal jurisdiction is "in a state of complete disarray." Pet. Br. at App. 16. The Court should grant the petition because the circuit courts and state courts need the Court's guidance now on this important issue.

II. Petitioner's Argument that this Case is the Ideal Vehicle for Resolving the Question Presented Stands Unrebutted

As Insta-Mix explained in its petition, this case presents an ideal set of facts to use in deciding the constitutionality of the "stream of commerce" versus the "stream of commerce plus" tests for personal jurisdiction. As the district court found below, the ***only*** contact that Petitioner had with Louisiana regarding the products at issue was that it sold those products to Wal-Mart in Colorado, and then Wal-Mart shipped those products to its distribution centers nationwide (which included its distribution center in Louisiana).[5]

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[5] Respondent improperly attempts to reargue factual findings that the lower court resolved against it. Without a single record cite, Respondent claims that it was Petitioner, not Wal-Mart, who shipped products to Louisiana. Opp. Br. at 2 n.1. Respondent falsely claims that "[t]his is not disputed." *Id.* Not only was that disputed, but the district court explicitly made a factual finding that Petitioner's products were "picked up by Wal-Mart on its ***own truck*** or by a trucking company which ***Wal-Mart hired*** in Colorado. In other words, [***Petitioner***] ***does not ship to the distribution center in Louisiana.***" Pet. Br. at App. 25 (emphasis added). While the Fifth Circuit found it "implausible" that Petitioner did not ***know where Wal-Mart shipped the products***, it did not disturb the factual finding that ***Petitioner did not ship any products to Louisiana***. *Id.* at App. 7-8. Thus, that factual finding is not before the Court.

Thus, while it was foreseeable to Petitioner that its products would enter Louisiana, Petitioner engaged in none of the "plus" factors described in Justice O'Conner's *Asahi* plurality opinion.[6] Indeed, Respondent implicitly concedes this point as it never argues that the district court would have jurisdiction if the Court were to adopt Justice O'Conner's "stream of commerce plus" test. *See* Opp. Br. at 10.

Therefore, Petitioner's argument stands unrebutted that this case is the ideal vehicle to resolve the severe split in the circuits and state courts regarding the proper jurisdictional standard in stream of commerce cases. Thus, the Court should use this case to provide a single national personal jurisdiction standard which will provide certainty to the courts and to the countless companies that sell products into this country's stream of commerce. The petition for *certiorari* should be granted.

III. The Proper Test for Deciding Personal Jurisdiction is "Stream of Commerce Plus"

Respondent argues at length that the "stream of commerce" test is the better test for personal jurisdiction. Opp. Br. at 8-13. Respondent is in error for several reasons. First, many of the arguments Respondent makes are facially wrong. For example, Respondent argues that the "stream of commerce plus" test "necessitates that an almost personal

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[6] Consequently, this case is the classic stream of commerce personal jurisdiction case. It involves the sale of products in a state of origin, for ultimate distribution or use in the forum state by a company that believes the products may or will reach the forum state but engages in no other activities involving the forum state. Based on these facts, the Fifth Circuit found jurisdiction using the "stream of commerce" test. But, as Judge DeMoss noted, there would not be jurisdiction using the "stream of commerce plus" test because of the total absence of "plus" factors. *See* Pet. Br. at App. 17.

relationship be shown between a party and the particular forum state." *Id.* at 9. But that argument is a straw man; there is nothing in the "stream of commerce plus" test that requires a personal relationship between the defendant and a forum state. Rather, the "stream of commerce plus" test states that merely placing items into the stream of commerce is not purposeful availment of the benefits and protections of forum state laws, and thus it requires some additional act on the part of the defendant. *See* Pet. Br. at 10-11. Similarly, Respondent's claim that to "require . . . [the stream of commerce plus test] is inconsistent with this Court's precedent," Opp. Br. at 11, is also flatly wrong. Respondent failed to cite even a single case from the Court that is inconsistent with the "stream of commerce plus" test, because ***there is no such precedent.***

Second, Respondent's policy arguments in support of the "stream of commerce" test fail to address the constitutional issue involved. The question before the Court is not whether policy arguments weigh in favor of "stream of commerce" or "stream of commerce plus." Rather, the question is whether the "stream of commerce" test is constitutional when a defendant merely places items into the stream of commerce, knows that some of its products may or will end up in the forum state, but has not "purposefully avail[ed] itself of the privilege of conducting activities within the forum State." *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958).

In any event, even assuming *arguendo* that Respondent might be correct that the "stream of commerce" test is constitutional, the Court should still grant the petition. As Petitioner explained in its opening brief, with many circuits and states using the "stream of commerce plus" test and others using the "stream of commerce" test, a business has no way of knowing where it can be sued and how it

should order its affairs to avoid suit in a given jurisdiction.[7] Thus, the Court needs to resolve this issue so that there is one constitutional standard for personal jurisdiction.

IV. Only the "Stream of Commerce Plus" Test Comports with Federalism

Before addressing Petitioner's federalism argument, Respondent raises a red herring regarding which Due Process Clause applies in this case. The Fifth Circuit analyzed this case under the due process clause of the Fourteenth Amendment. *See* Pet. Br. at App. 4. Respondent argues, however, that Petitioner (and, by extension, the Fifth Circuit) is wrong in stating that the "constitutional provision implicated is the Due Process Clause of the Fourteenth Amendment." Opp. Br. at 1 (contending that because subject matter jurisdiction was based on a federal question, "the provision, at issue, is more accurately the Due Process Clause of the Fifth Amendment").

While some courts have used a Fifth Amendment analysis when subject matter jurisdiction is based on a federal question, *see, e.g., Honeywell, Inc. v. Metz Apparatewerke*, 509 F.2d 1137, 1143 (7th Cir. 1975), other courts have held that where personal jurisdiction is based on the state long-arm statute rather than a federal statute,[8] the

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[7] As the Petition explained, this conflict regarding which test to use is especially problematic in diversity cases in states that use a different test than the corresponding regional circuit uses. In those cases, the only way to know whether a court would have jurisdiction over a company would be to know the amount in controversy in advance. Pet. Br. at 9. Obviously, it is impossible for a business to know in advance how much a plaintiff is going to claim as damages before a lawsuit has been filed.

[8] Although personal jurisdiction is usually based on the long-arm statute of the state where the district court resides, there are a few instances where personal jurisdiction is created by federal statute. *See, e.g.*, 35

due process clause of the Fourteenth Amendment applies.[9] *See, e.g., Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1358 n.1 (Fed. Cir. 1998) ("Because the Fourteenth Amendment constrains the reach of a state's long-arm statute, it also constrains the reach of a federal court that relies on such a statute."). Although the approach taken in *Red Wing* appears to be the better approach, it is not necessary to decide because the personal jurisdiction analysis and central issue before the Court remain the same even if the Court concludes that the correct starting point is the Fifth Amendment. Thus, as Respondent concedes, Opp. Br. at 14-15, "the question of which Due Process Clause controls the personal jurisdiction inquiry becomes purely academic." *Red Wing*, 148 F.3d at 1358 n.1.

Respondent next argues that Judge DeMoss and "other courts such as the Fourth Circuit are both mistaken" in their concerns that the "stream of commerce" test violates principles of federalism. Opp. Br. at 12. Respondent cites *Omni Capital* for the proposition that due process only addresses individual liberty interests, not ***state sovereignty*** concerns. Opp. Br. at 16. But Respondent takes that language out of context. There, the Court distinguished (non-waivable) ***judicial sovereignty*** based on subject matter jurisdiction from the due process basis for (waivable)

U.S.C. § 293 (2000) (granting personal jurisdiction to the District Court for the District of Columbia where a foreign patentee has not designated someone to receive service of process in the United States). In a case where personal jurisdiction is conferred by federal statute, only the due process clause of the Fifth Amendment would be implicated.

[9] Contrary to the implication in Respondent's brief, Opp. Br. at 14 n.13, *Omni Capital* does not address the issue of whether the Due Process Clause of the Fifth or Fourteenth Amendments applies when a district court exercises personal jurisdiction based on a state long-arm statute in a case based on a Federal question. *See, generally, Omni Capital, Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 100-104 (1987).